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No. 7901

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SALVATORE MAUGERI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

This appeal is from a judgment and order made by the United States District Court of California, sentencing appellant upon his conviction of conspiracy, to a term of two years in the United States Penitentiary and ordering him to pay a fine of five thousand dollars.

THE INDICTMENT.

The indictment in this case charges three defendants, Gaspare La Rosa, Salvatore Maugeri and Jimmie Pasqua (true name Frank Scarpatura), in twelve substantive counts with the possession and passing of falsely made, forged and counterfeited obligations

and securities of the United States; that is to say, falsely made, forged and counterfeited Federal Reserve notes of the Federal Reserve Bank of New York, New York.

The first count of the indictment charges the three defendants with the possession of one of said notes on the 28th day of September, 1934.

The second count of the indictment charges the three defendants with the passing of the same note with intent to defraud the United States and Mrs. Fremont Simpson on or about the 28th day of September, 1934;

The third count charges the three defendants with the possession of another of said notes on or about the 13th day of November, 1934;

The fourth count charges the three defendants with the passing of the same note with intent to defraud the United States and Mrs. W. F. Buchan on or about the 13th day of November, 1934;

The fifth count charges the three defendants with the possession of one of the said notes on or about the 23rd day of November, 1934;

The sixth count charges the three defendants with passing the said note with intent to defraud the United States and Earl Roberts on or about the 23rd day of November, 1934;

The seventh count charges the three defendants with the possession of another note on or about the 30th day of November, 1934;

The eighth count charges the three defendants with the passing of the said note with intent to defraud the United States and William F. Byrnes on or about the 30th day of November, 1934;

The ninth count charges the three defendants with the possession of another note on or about the 22nd day of December, 1934;

The tenth count charges the three defendants with the passing of the same note with intent to defraud the United States and Clarence L. Smith on or about the 22nd day of December, 1934;

The eleventh count charges the three defendants with the possession of another note on or about the 18th day of February, 1935;

The twelfth count charges the three defendants with the passing of the same note with intent to defraud the United States and Dino Chelini and Gio Resoni on or about the 18th day of February, 1935;

The thirteenth count charges the three defendants with conspiracy to commit offenses against the laws of the United States, to-wit, to keep in their possession and conceal, and to pass, utter, publish and sell, and attempt to pass, utter, publish and sell, with intent to defraud the United States and other persons to the grand jurors unknown, falsely made, forged and counterfeited notes, and that thereafter one or more of said defendants, as mentioned by name, performed eight overt acts to effect the object of said conspiracy. (Tr. 2-16.)

The defendant Gaspare La Rosa pleaded guilty to all thirteen counts in the indictment, and therefore

was not on trial. (Tr. 18.) Counts three, four, seven, eight, eleven and twelve were ordered dismissed by the Court as against the appellant Salvatore Maugeri and defendant Pasqua upon motion of the United States Attorney. Counts one, two, five, six, nine and ten, along with count thirteen, the conspiracy count, were submitted to the jury as against the appellant Salvatore Maugeri and defendant Pasqua. Defendant Pasqua was found guilty on counts one, two, five, six, nine, ten and thirteen, being all the counts submitted to the jury. Appellant Salvatore Maugeri was found not guilty on counts one, two, five, six, nine and ten, and guilty on count thirteen, the conspiracy count.

APPELLANT'S ASSIGNMENTS OF ERROR.

Appellant assigns four errors as ground for his appeal:

(1) The trial Court erred in refusing to grant timely motions of the appellant to strike from the record the testimony of each of the twenty-four witnesses for the prosecution on the grounds that it was incompetent, irrelevant and immaterial and hearsay as to appellant, and upon the further ground that no conspiracy had been proven in said action as against the appellant;

(2) The trial Court erred in refusing to grant the motion for a directed verdict of not guilty made at the conclusion of the government's case, thereby allowing the case against appellant to go to the jury;

(3) The trial Court erred in refusing to grant the motion of appellant for a directed verdict of "not guilty" at the conclusion of the evidence in the case;

(4) The evidence is insufficient as a matter of law to support a verdict of guilty against appellant.

FACTS OF THE CASE.

It is undisputed that the defendants Jimmie Pasqua (true name Frank Scarpature), and Gaspare La Rosa, appellant's co-defendants, were engaged from September 28, 1934, up to and including December 22, 1934, in passing counterfeit bills. The record will show that in the passing of these various counterfeit bills by Pasqua and La Rosa, during the first part of this period they used a 1924 Hupmobile touring car purchased by Pasqua on the 29th day of September, 1934. (Tr. 72-74; 77-81; 73-75; 75-77.) It is further established that on and after November 18, 1934, the same two defendants used an Essex coupe automobile in the passing of counterfeit bills. (Tr. 52, 54, 55, 58.)

The facts connecting appellant with the conspiracy to pass said counterfeit bills are as follows:

On June 1, 1933, appellant purchased a second-hand Studebaker automobile which was registered in the name of one Jim Domenic, 155 Lighthouse Avenue, Santa Cruz, California. (Tr. 83, 85.) The records of the State of California Division of Registration, Department of Motor Vehicles, show the 1934

license number of this same Studebaker to be 3J-826. (Tr. 85, 86.) On September 11, 1934, the wreck of the Studebaker mentioned was taken out of the ocean near Santa Cruz and delivered to Jim Domenic at 155 Lighthouse Avenue, Santa Cruz. (Tr. 88, 89.) The record further shows appellant to be the owner of these premises and Domenic as tenant. (Tr. 87.) On November 18, 1934, the Studebaker was hauled away from the premises at 155 Lighthouse Avenue by a garage man, at which time the license plate was missing from the automobile. (Tr. 88-89.) On November 17, 1934, the appellant, together with his co-defendant Jimmie Pasqua, drove an Essex coupe automobile into an auto repair shop of one Al Logan in San Francisco. The Essex car was repaired on order of the appellant. Appellant paid the repair bills. Appellant said Pasqua wanted to drive the car to Los Angeles. (Tr. 94-97.) On November 18, 1934, this same Essex coupe operated by defendants Pasqua and La Rosa, and identified as such, was used in passing a counterfeit $10 bill. (Tr. 52-54.) At this time the license plate on the Essex coupe was 3J-826, the same license number which had theretofore been on the Studebaker which was wrecked and which had been purchased by appellant and registered in the name of Jim Domenic. (Tr. 52-54.) On November 23, 1934, the same Essex coupe, operated by defendants Pasqua and La Rosa, was used in the passing of another counterfeit $10 bill, the same license number, 3J-826, being on the car at this time. (Tr. 55-58, 90-94.) On November 30, 1934, the Essex coupe having been left at a service station in San Mateo

County, did not bear license number 3J-826, but a different 1934 license plate which had been issued to a man named Larkin. (Tr. 99-100, 101-106.) On November 30, 1934, appellant, in company with defendant La Rosa, purchased an automobile tire in San Francisco, for which he paid. (Tr. 97, 98.) Appellant placed the tire in his own automobile, a Studebaker sedan, and delivered it to the service station in San Mateo County where the Essex coupe had been left two days before by Pasqua and La Rosa, and where the tire so delivered by appellant was placed on the Essex coupe by the attendant at the service station. Appellant arrived at the service station at 2:00 o'clock in the afternoon and remained in and around the station until dusk. La Rosa then drove the Essex coupe to San Francisco, followed by appellant in his Studebaker sedan. Appellant stopped enroute no less than three times for periods of approximately five minutes each to look back over the route over which he had come, after which he would again catch up with La Rosa in the Essex. (Tr. 101-106.) Subsequent to this time the same Essex coupe was returned to the shop of Al Logan for further repairs, appellant again paying the repair bill. (Tr. 94-97.) And if any further evidence were needed as to appellant's ownership and operation of this Essex coupe it is found in the testimony of defendant Pasqua at the trial, as follows:

> "The only thing I had to do with the Essex was once when Maugeri asked me to bring it up from San Mateo for him, and another time when he asked me to take it down to the ferry." (Tr. 123.)

On the very day appellant and defendant La Rosa returned from San Mateo County, La Rosa driving the Essex, he, La Rosa, passed a $10 counterfeit bill on William Byrnes at 260 Octavia Street, San Francisco. (Tr. 59-60.)

Regarding the participation of the appellant in the unlawful activities of his co-defendants, the following is pertinent: The Hupmobile automobile heretofore mentioned was purchased by defendant Pasqua on the 29th day of September, 1934. Immediately thereafter and on the same day the defendants Pasqua and La Rosa, using the same Hupmobile automobile, attempted to pass a $10 counterfeit bill on Ellsworth Ramos, who reported the name and number of the car, together with a description of the two defendants, to the police authorities in the City of Berkeley. (Tr. 77-81.) This same car was used by defendants Pasqua and La Rosa in the passing of counterfeit bills on September 30, 1934 (Tr. 73-75), and on October 2, 1934 (Tr. 75-77), and was found abandoned on October 4, 1934 (Tr. 81-83), only six days after its purchase, obviously because the operators of it were aware that the alarm had gone out and that it was no longer safe to use that car. Shortly thereafter and on November 17, 1934, the Essex coupe makes its appearance on the scene and appellant arranges and pays for putting it into running order. On the said Essex coupe when used in the passing of counterfeit bills the license plate from the old Studebaker automobile purchased by the appellant appears. Later we find appellant purchasing and paying for a tire for this car, which had already been used by his co-

defendant in the passing of counterfeit money, and having the tire placed on said Essex automobile.

Thereupon, in secrecy and stealth, this car is brought to San Francisco by one of appellant's co-defendants, appellant covering the approach in the rear in his own Studebaker sedan—obviously acting as lookout. It will be noted that prior to these transactions the parties had been unsuccessful in their attempt to pass at least one bill. They were naturally apprehensive that they might be already sought by officers of the law. It will be further observed that on that very same day another counterfeit bill was passed in San Francisco by one of appellant's co-defendants, Gaspare La Rosa. (Tr. 59-60.) Appellant and his co-defendants during all this time were constantly together, either in one or the other's automobile, or on foot, and Pasqua and La Rosa had been sent into one service station where they passed a counterfeit bill, to obtain a rate on gas at appellant's request. (Tr. 68.)

ARGUMENT.

Appellant assigns as error upon the part of the trial Court the refusal to grant motions of appellant to strike from the record the testimony of each of the twenty-four witnesses for the prosecution upon the grounds that it was incompetent, irrelevant and immaterial and hearsay as to appellant, and upon the further ground that no conspiracy had been proven in said action as against appellant. It will be remem-

bered that six of the counts contained in the indictment were dismissed by the Court upon motion of the United States Attorney, and appellant was found not guilty on the remaining counts charging substantive offenses. We are concerned then solely with the conspiracy count upon which appellant stands convicted. It is, of course, well settled that the offense of conspiracy to commit a crime is separate and distinct from the crime that may be its object.

Gerson v. U. S., 25 F. (2d) 49 (U. S. C. C. A. Okla. 1928);

O'Brien v. U. S., 51 F. (2d) (U. S. C. C. A. Ind. 1931);

Rivera v. U. S., 57 F. (2d) 816 (U. S. C. C. A. Porto Rico 1932);

Telman v. U. S., 67 F. (2d) 716 (U. S. C. C. A. New Mexico 1933);

Curtis v. U. S., 67 F. (2d) 943 (U. S. C. C. A. Col. 1933).

Appellant contends, however, that the submisssion to the jury of the counts which charged substantive offenses upon which appellant was found guiltless, in all human likelihood caused prejudice in the minds of the jurors to such an extent that appellant's liberty became the sacrifice under the conspiracy charge. This same point was made in the case of *Rivera v. U. S.,* 57 F. (2d) 816, 820, First Circuit, in which case the Court said:

> "The defendants contend that, as the jury acquitted them under Count 2 of the Indictment, which alleged the substantive offense of facilitating the transportation of contraband liquor, the

> verdict of guilty of conspiracy to commit a like offense is inconsistent and an absurdity. The answer to this contention is that conspiracy to commit an offense and the substantive offense are two separate and distinct criminal acts (Williamson v. U. S., 207 U. S. 455), and it is not essential that the substantive offense be consummated. The conspiracy is none the less punishable. Acquittal of the substantive offense is not res adjudicata in a trial for conspiracy to commit it. (Coy v. United States, 5 Fed. (2) 309; Heike v. United States, 227 U. S. 131."

Appellant further raises the point that the verdict is inconsistent in that it establishes, by the acquittal on the substantive counts, that appellant did not aid, abet, accede to or participate in any way in the possession and passing of the notes. This, it is contended by the appellant, involves a finding that appellant had no knowledge that the notes were possessed or passed, and yet he is held to have conspired to do these things. Upon this point the United States Supreme Court, in the case of *Dunn v. U. S.,* 284 U. S. 390 (a case which arose in this District), said:

> "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it were a separate indictment. Latham v. The Queen, 5 Best and Smith 635, 642, 643; Selvester v. United States, 170 U. S. 262. If separate indictment had been presented against the defendants for possession and for maintenance of a nuisance and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as res adjudicata of the other. Where the offenses are

> separately charged in the counts of a single indictment the same rule must hold."

Appellant further complains of the admission by the trial Court of testimony relative to the possession and passing of the counterfeit notes by the defendants La Rosa and Pasqua, and assigns as error the failure of the trial Court to strike this testimony as to appellant. It is conceded by the Government that in all of the testimony relative to the possession and passing of the counterfeit bills referred to in the various counts of the indictment there is no mention made of appellant. The Government did not prove the possession or passing of any counterfeit bills by appellant personally. But the Government did prove the participation of appellant in the possession and passing of the same.

However, if there was error on the part of the trial Court (which is not conceded), in the failure to strike the testimony of the various witnesses as against the appellant on the substantive counts, the error, if any, was cured by the verdict of not guilty as to the appellant on the substantive counts. Moreover, the testimony, considering the wide latitude permitted in the introduction of evidence in conspiracy cases, was certainly properly admissible against appellant on the conspiracy count.

As was said in the case of *Lew Moy v. United States,* 237 Fed. 51:

> "The acts and statements of one co-conspirator done or entered in facilitating the purpose of the conspiracy are admissible against others. It is

not necessary that each conspirator participate in each step or stage of the common general design. One of them may do one thing, another, another. Some may take major parts while the participation of others may be in a minor degree."

Also see *Remus v. U. S.*, 291 F. 513 at 517, in which the Court said:

"A great number of assignments of error are directed to the admission of evidence. It is unnecessary to discuss these assignments in detail. They are all based upon the theory that the evidence offered over the objection of the defendant was incompetent and irrelevant to prove the material elements of the offense charged. This information charges these defendants with a joint unlawful enterprise. Any evidence tending to prove the activities and cooperation of these defendants in the commission of the offense charged was admissible.

"All the evidence offered by the government and admitted over the objection of the defendants tended to prove the connection and participation of one or more of the defendants in the commission of the offense charged. It is claimed however that these defendants could not all have been guilty of maintaining a nuisance because they were not all in possession and control of the premises. This position is not tenable. Two or more individuals may join in the maintenance of a nuisance of this character upon premises owned, occupied, and controlled by one of them. If the proof shows that each contributed property, money or service necessary to the commis-

> sion of the offense * * * all may be equally guilty as principals."

That the act of one conspirator in furtherance of the common design is the act of all was also held in the case of *Olmstead v. U. S.,* 5 F. (2d) 712 (Ninth Circuit), and *Coates v. U. S.,* 59 F. (2) 173 (Ninth Circuit).

The above rule is too well established to require any further reference to the decided cases. From this it follows that if the conspiracy was established as against appellant, the testimony of the Government's witnesses was properly admissible.

Appellant further complains that there is no evidence that he at any time committed an unlawful act. No better answer to this can be found than in the case of *Heskett v. U. S.,* 58 F. (2d) 897 (Ninth Circuit), in which case this Court said:

> "There is no rule of law that requires an overt act to be an unlawful one. It may be in itself a perfectly lawful act which becomes unlawful only when it is committed in pursuance of and to effect the objects of the conspiracy. Houston v. United States, 217 Fed. 842; United States v. Supperman, 215 Fed. 135; U. S. v. Shevlin, 212 Fed. 343."

We come to appellant's assignment of error on the part of the trial Court, based on its failure to grant the motion of appellant for a directed verdict of not guilty at the conclusion of the Government's case, and at the conclusion of all the evidence in the case. The answer to appellant's assignment on this point may

be found in cases decided in our own Circuit. In the case of *U. S. v. Lesher,* 59 F. (2d) 53 (Ninth Circuit), the Court, speaking through Mr. Justice Neterer, said:

> "The sole issue is alleged error in overruling defendant's motion for a directed verdict. This case, like all like cases, has its difficulties. The court does not weigh the evidence, but considers whether there is any or sufficient evidence to sustain a verdict. See Ford v. United States (C. C. A.), 44 F. (2d) 754. The trial judge must, in the exercise of sound discretion, determine whether upon the evidence produced a verdict can be sustained, not weigh the evidence; if there is evidence, it must be submitted; if not, it is pronouncedly his duty to direct a verdict."

To this same effect is the case of *Vilson v. United States,* 61 F. (2d) 901 (Ninth Circuit). In the *Vilson* case the facts were as follows: A conviction had been secured on three counts: (a) unlawful possession of intoxicating liquors; (b) unlawful manufacture of intoxicating liquors; and (c) unlawful possession of a still and equipment designed for the manufacture of intoxicating liquors.

A still was found in a shed or garage on premises consisting of a house, barn and shed or garage, and also a small garden on the Marquam Road. The premises had been under surveillance for sometime by Government agents who were reliably informed that a still was being operated on these premises. May 26th they saw the defendant working around in the garden patch, and on a number of subsequent occa-

sions the agents saw the defendant driving in or out of the premises, talking to various persons. On one occasion they saw the defendant drive up to the house in a Ford coupe, enter the house and shortly thereafter return to the car in front of the house carrying a ten-gallon keg, which he put in the car and drove away. On June 2nd the agents, with a deputy sheriff, went to the vicinity of the premises and "waited in the woods". They saw defendant and another person drive up in the same Ford coupe. Defendant opened the gate and the car was driven in and the parties were joined by a co-defendant, one Caesar. The search warrant was then executed. A 60-gallon still and vats full of mash were found. The Court, speaking through Mr. Justice Neterer, said:

> "The issue on appeal was presented on denial of a motion for a directed verdict. The record not only shows there is substantial evidence to sustain the charges but tended to show that defendant aided and abetted others in the offenses on which defendant is convicted, and that defendant engaged with others in a common conspiracy to do such acts, and in either case each of the parties so engaged is guilty of the offenses in issue."
>
> *Samich v. United States,* 22 F. (2d) at page 573;
>
> *Shively v. United States,* 299 F. 710.

In considering the evidence on a motion for a directed verdict the evidence must be considered in its most favorable aspect to the appellee.

> *U. S. v. Scarborough,* 57 F. (2d) 137;
>
> *Knable v. U. S.,* 9 F. (2d) 567;

Benton v. U. S., 202 F. 344;
Kelly v. U. S., 258 F. 392.

If there is substantial evidence it must be submitted to the jury, whose function it is to consider and weigh it, and this includes credibility of witnesses.

Montana Tonopah Mining Co. v. Dunlap, 196 F. 612;
U. S. v. Lesher, 59 F. (2d) 53;
Toledo St. L. & Wr. Co. v. Howe, 191 F. 776;
Enstrom v. De Witt, 58 F. (2d) 137;
Woodward v. Atlantic Coast Line R. R., 57 F. (2d) 1019.

Appellant's fourth assignment of error is that the evidence is insufficient as a matter of law to support a verdict of guilty against defendant. In support of this point appellant leans heavily upon the cases of *Sugarman et al. v. U. S.,* 37 F. (2d) 663 at page 665; *Chin Wan et al. v. U. S.,* 35 F. (2d) 667, and *Haning v. U. S.,* 21 F. (2d) 508, 509.

The first two cases mentioned were decided in this Circuit and the *Haning* case in the Eighth Circuit. Appellant further cites a number of cases, all more or less stating the rule that when all the substantial evidence is as consistent with innocence as with guilt it is the duty of the Appellate Court to reverse a judgment of guilt.

It will be noted, however, that in all of the cases cited to this effect the evidence, if any, as to the guilt of the various defendants was very meagre, and leaned far more to the side of innocence than to guilt. The facts set out in the two cases decided in this Cir-

cuit, the *Sugarman* case and the *Chin Wan* case, forcibly bear out this point. As stated by the Court in the *Sugarman* case:

> "It will thus be seen that the only competent testimony tending to connect the appellant Williams with the commission of the offense was the company he was found in, the giving of an assumed name at the time of his arrest, and the unexplained possession of a coat comparing in texture with a pair of pants found in an abandoned boat."

And in the *Chin Wan* case, as stated by Mr. Justice Wilbur:

> "As to appellant Lett the case is entirely different. His only connection with the transaction involved in this appeal was as set forth above. It was not shown that he had any knowledge of the contents of the box transported by him, or of the criminal purposes of the other parties. He simply drove the automobile containing the box to the express office at the request of the witness Rosa, aided him to remove the box from the automobile, told him to do as instructed and refused to wait for him at the express office when requested to do so."

In the *Haning* case there was even less evidence from which to infer guilt.

The rule is well established that circumstantial evidence may establish guilt in conspiracy cases. Circumstantial evidence was well defined in the case of

> *Rumley et al. v. U. S.*, 293 F. (2d) 532 at 551 (C. C. A. 2d),

as follows:

> "Circumstantial evidence is that evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency to lead the mind to a conclusion that the fact exists which is sought to be established. It is legal evidence and a jury must act upon it as if it were direct when it is satisfactory beyond a reasonable doubt."

Also see the case of

Ferris v. U. S., 40 F. (2d) 837,

in which the question of the sufficiency of the evidence to prove the charge of unlawful transportation of whisky and gin and for conspiracy to so transport was raised. The facts there involved were briefly as follows:

About 8 o'clock on the morning of March 6, 1929, the sheriff of Sonoma County, with one of his deputies, stopped a green painted auto truck driven by the defendants Sanchez and Wilson. The truck was found to contain a quantity of gin and whisky. Within a space of time estimated to be two or three minutes following the arrest of Sanchez and Wilson a blue sedan automobile was observed approaching. In the sedan were the two appellants Ferris and Marino. Upon being stopped Ferris gave his name as Williams, and Marino that of Mays. Ferris was carrying a 38 Colt revolver. Upon the floor of the car was found a Thompson machine gun. Upon being questioned Ferris said the guns were for hijackers. Marino stated they were hunting quail. Also found in the car was a coil of rope with green paint on it of the same color as the green truck. All the defend-

ants wore the same kind of pants. Ferris said to the sheriff: "I thought the officers in this county were all right to come through here." The foregoing was substantially all the evidence offered against the appellants. The Court, speaking through Mr. Justice Norcross, in discussing the facts, said:

> "Where, as in this case, circumstantial evidence is relied upon to support a verdict of guilt, all the circumstances so relied upon must be consistent with each other, consistent with the hypothesis of guilt, and inconsistent with every reasonable hypothesis of innocence. *It does not not follow, however, from this statement of the rule, that the admission in evidence of certain circumstances which may also be consistent with innocence is determinate of the question of the sufficiency of the evidence unless such circumstances are essential to the government's case.*
>
> "Taken alone, the giving of assumed names and the character of clothing worn by the several defendants might be regarded only as suspicious circumstances, insufficient in themselves to support a conviction. (Citing Sugarman et al. v. U. S.)"

But, taking all the circumstances into consideration, the Court held that there was presented a case consistent with guilt and wholly inconsistent with any reasonable hypothesis of innocence.

Appellant claims that as to him there is at most only suspicions that he participated in or had knowledge of the unlawful acts of his co-defendants La Rosa and Pasqua. In reply to this it is respectfully submitted that taking into consideration all the facts

of the case as a whole, there is only one logical conclusion to be drawn therefrom, and that is the conclusion that was drawn by the trial jury, viz.: that the defendant is guilty of the crime charged.

It is admitted by appellee that the facts in this case appear complicated. But when once assembled they are simple and overwhelmingly tend to a most positive degree to establish appellant's guilt. A brief resumé of the formidable array of facts as established by the Government will so prove.

1. As a result of being forced to abandon the Hupmobile car used in their unlawful activities the defendants Pasqua and La Rosa were faced with the need of obtaining a different vehicle which must of necessity be cheap so that in its turn it also could be abandoned in the event, as in the first instance, the chase should become too hot.

2. As a result of this necessity we next find defendant Pasqua, in company with the appellant, preparing a somewhat dilapidated Essex coupe for action in the repair shop of Al Logan in San Francisco.

3. Appellant paid for the work of putting this vehicle into commission.

4. Appellant gave as the ostensible reason for having the car repaired that Pasqua wanted to drive it to Los Angeles.

5. That immediately thereafter, on November 18, 1934, defendants Pasqua and La Rosa in this same Essex coupe automobile, attempted to pass a $10 counterfeit bill on Charles Blach, service station operator at El Cerrito, California.

6. The license number on the Essex coupe at this time is 3J-826. *This same license number was formerly on an old Studebaker car purchased by appellant Maugeri on June 1, 1933,* and wrecked on or about September 11, 1934.

7. On the 23rd day of November, 1934, this same Essex coupe bearing license number 3J-826 was used in passing a $10 counterfeit bill on Earl Roberts, service station operator at 18th Street and Potrero Avenue in San Francisco.

8. A short time after November 18, 1934, appellant stated to Al Logan that the Essex coupe which had been repaired by Logan had burned out a bearing and that he would bring the car in.

9. Shortly thereafter appellant Maugeri did bring in the Essex coupe to Al Logan and after having it repaired paid for the work.

10. On the 28th day of November, 1934, La Rosa and Pasqua, driving the Essex coupe, left the same with Jules A. Zimmerlin, service station operator at Ninth Avenue and Bayshore Highway in San Mateo County, because it was disabled on account of a blownout tire.

11. When the Essex coupe was in Zimmerlin's service station *it did not have license number 3J-826 it, but another license number which had been issued to a man named Larkin.* Obviously, the change of license plates had been made subsequent to November 23, 1934, as the defendants apparently suspected that the license plate which they had theretofore

been using might by this time be under investigation by the officers.

12. On November 30, 1934, defendant La Rosa and appellant left appellant's home in a *Buick roadster owned by defendant Pasqua,* and drove to the La Salle Restaurant in San Francisco, where they remained but a short time. Upon leaving the restaurant they drove away in *appellant's Studebaker sedan* (not the Studebaker that was wrecked), leaving Pasqua's Buick parked near the La Salle Restaurant.

13. Immediately afterwards appellant purchased and paid for a tire in San Francisco.

14. Immediately after this purchase appellant and La Rosa proceeded in appellant's Studebaker sedan to the service station of Jules Zimmerlin, where they had said tire placed upon the Essex coupe which had been left there by La Rosa and Pasqua two days previous.

15. Appellant and La Rosa arrived at this service station at 2 o'clock in the afternoon. The tire was taken by appellant from his Studebaker sedan and placed on the Essex coupe by the attendant at the service station. They remained in and around the service station until dusk.

16. La Rosa then proceeded in the direction of San Francisco in the Essex at a speed of approximately 12 miles an hour.

17. Appellant remained seated at the wheel of his Studebaker sedan for approximately 10 minutes after La Rosa left. He then followed La Rosa, catching up to him shortly.

18. La Rosa, in the Essex, turned west at the intersection which connects with San Bruno and the Bayshore Highway. At this point appellant drove his car to the right side of the Bayshore Highway headed north and stopped. Shortly thereafter appellant followed over the same road as the Essex.

19. Half way between the Bayshore Highway and the Southern Pacific Railroad track appellant stopped for approximately five minutes, looking back toward the Bayshore Highway over which he had just come. Appellant then proceeded to the El Camino Highway, where he turned north and caught up with the Essex by the Tanforan Track.

20. Appellant at this point drove his car to the side of the highway and stopped there approximately five minutes, following which he again followed the Essex to the intersection of 19th Avenue and Sloat Boulevard in San Francisco, where both cars stopped and appellant and La Rosa talked for sometime.

21. On December 8, 1934, appellant and Pasqua were seen leaving the La Salle Restaurant in Pasqua's Buick roadster, the same Buick appellant and La Rosa had started out in on the 28th day of November, appellant and Pasqua at this time being followed to Al Logan's repair shop, where the Essex coupe was again seen. When they left Logan's shop Pasqua drove away in the Essex and appellant in the Buick.

22. On April 8, 1935, La Rosa was arrested riding in this same Essex coupe, at which time the tire theretofore purchased by appellant was taken off the Essex.

We submit that the foregoing items of evidence tend forcibly to show that appellant was actively engaged with his co-defendants in passing counterfeit bills. He furnished the mode of transportation used by them, to-wit: the Essex coupe, having it placed in working order at his own expense. The license plate which was used upon that vehicle until its use became too dangerous is directly traced to a car which had formerly been bought by the appellant. When the Essex coupe blew out a tire it was appellant who purchased and paid for a new tire and who transported his co-defendant La Rosa to San Mateo County for the purpose of having the tire placed upon the Essex coupe. Thereafter, under cover of darkness appellant, in his own car, covers the journey of La Rosa in the rear to San Francisco, La Rosa driving the Essex coupe upon which the license plates had been changed, obviously for protection from officers of the law. Appellant repeatedly stopped on the way, a known device of lawbreakers to detect any pursuing automobile. In no other way can the actions of appellant at this time be explained.

It is, of course, indisputable that the foregoing acts of appellant which were proved by the Government, if done with knowledge of the criminal activities in connection with the use of the Essex automobile, would be ample to establish that appellant was a party to the conspiracy. The contention of appellant in the final analysis is that there is no evidence from which such knowledge on his part could reasonably be inferred. Being a mental state, of course, it is not always possible to produce direct evidence of

knowledge or intent. As well stated by the Circuit Court of Appeals for the Second Circuit in the case of

Coltabellota v. U. S., 45 F. (2d) 117:

"Being nothing more tangible than a state of mind the defendant's intent must of necessity remain his secret except only in so far as he disclosed it by speech or conduct. Although he denied any part in her going away and attempted to prove an alibi, the jury had the right to disbelieve him and his evidence and take the facts as disclosed by the government's evidence to be true. It had an equal right to make all reasonable deductions from the facts proved to determine his intent."

"That this element of an offense may be implied from established facts is beyond dispute."

Wuichet v. U. S., 8 Fed. (2d) 561-562 (C. C. A. 6th).

The narrow question then is whether there was in the foregoing facts any reasonable basis for the inference drawn by the jury that those acts of the appellant were performed with knowledge of the unlawful enterprise. Obviously the acts tended to further the conspiracy, so that knowledge and intent are the only elements necessary to be considered here. Do not the foregoing facts give rise to a reasonable inference that appellant had knowledge of the unlawful activities of his two co-defendants, in which activities the Essex automobile was used?

Clearly, all the actions of the appellant in preparing, equipping and paying for the work and equipment on the Essex strongly indicated that Pasqua

and La Rosa were merely his agents in operating that automobile in *some* sort of an enterprise. As will be observed from the evidence, apparently the only enterprise in which the Essex automobile was used by Pasqua and La Rosa was the enterprise of passing the counterfeit bills mentioned in the indictment. In that unlawful enterprise, of course, the matter of concealment was of primary importance. Does not the fact that the parties at first used on this vehicle a license plate which did not belong to the vehicle, but which had in fact been taken from another vehicle which appellant had purchased some time previously, tend to prove that he was fully cognizant of the unlawful use to which the Essex automobile was to be put? When this factor is viewed with the appellant's actions in financing the preparation, equipment and repairing of the vehicle during all the period of its use in this unlawful enterprise, and with his actions and conduct in connection with its conveyance from San Mateo to San Francisco on the evening of November 30, 1934, certainly it would be too much for the Court to say that the jury could not reasonably infer from all the evidence that the appellant participated with knowledge in the unlawful enterprise. At the risk of possible undue repetition, we desire to stress the point that all of the actions taken and payments made by appellant in connection with the Essex automobile throughout that period show conclusively that he was the principal in some use to which it was being put, and that the defendants Pasqua and La Rosa were his agents. Certainly it is not a reasonable hypothesis that he not only paid for

putting the car into commission, but thereafter paid for other repairs and personally purchased and took to San Mateo a tire for the vehicle purely out of friendship or altruism in behalf of his two co-defendants! From all the evidence could the jury have arrived at any other conclusion than that appellant was promoting the activities of his co-defendants by his financing and personal aid in connection with the Essex automobile, that the activities which he was so promoting by those acts were the unlawful activities charged in the indictment, and that he did so knowingly and intentionally?

CONCLUSION.

In view of these facts it is submitted that appellant is taxing the credulity of this Court too far when he insists there is at most but a series of suspicious circumstances in connection with his proven activities in the criminal acts of his co-defendants La Rosa and Pasqua.

We submit that appellant has shown no error and that judgment should be affirmed.

Dated, San Francisco,
October 18, 1935.

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